

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 ANDREA NICOLE COSTELLO,

4 Plaintiff

5 v.

6 GLEN WOOD COMPANY d/b/a WOOD
7 BROTHERS RACING, a foreign corporation;
8 TRAVIS ALEXANDER, an individual; DOE
Individuals 2-10; DOE Employees 11-20; and
ROE Corporations 22-30,

9 Defendants

10 AND RELATED THIRD-PARTY CLAIMS

Case No.: 2:19-cv-01752-APG-BNW

**Order Denying Nevada Speedway, LLC's
Motion for Summary Judgment**

[ECF No. 71]

11 Third-party defendant Nevada Speedway, LLC moves for summary judgment,
12 contending that plaintiff Andrea Nicole Costello signed a release and waiver of liability that bars
13 her claims. ECF No. 71. I deny the motion because Speedway has failed to explain how it has
14 standing to rely on the release.

15 Summary judgment is proper where a movant shows that “there is no genuine dispute as
16 to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
17 56(a). A fact is material if it “might affect the outcome of the suit under the governing law.”
18 *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986). A dispute is genuine if “the evidence is
19 such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* at 248. The
20 moving party bears the initial burden of informing the court of the basis of its motion and the
21 absence of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When the
22 nonmoving party has the burden of proof at trial, the moving party need only point out “that
23 there is an absence of evidence to support the nonmoving party’s case.” *Celotex* 477 U.S. at 325;

1 *see also Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000) (stating that
2 the moving party can meet its initial burden by “pointing out through argument . . . the absence
3 of evidence to support plaintiff’s claim”).

4 Once the moving party carries its burden, the non-moving party must “make a showing
5 sufficient to establish the existence of [the disputed] element to that party’s case.” *McGrath v.*
6 *Liberty Mutual Fire Ins. Co.*, 836 F. App’x 551, 552 (9th Cir. 2020) (quotation omitted). I view
7 the evidence and reasonable inferences in the light most favorable to the non-moving party.
8 *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 920 (9th Cir. 2008).

9 The parties are familiar with the facts, so I will not repeat them here except where
10 necessary to resolve the motion. Costello claims she was a spectator at a NASCAR race when
11 defendant Travis Alexander ran into her with “a large pit box.” ECF No. 55 at 3 ¶ 14. Costello
12 sued Alexander and co-defendant Glen Wood Company, and those defendants filed third-party
13 complaints against Speedway. ECF Nos. 21, 69. Speedway now moves for summary judgment,
14 asking that Costello’s complaint be dismissed. ECF No. 71.¹ Speedway argues that, days before
15 Costello was injured, she signed a contract releasing and waiving claims for any injury “caused
16 by the negligence of the releasees” that she might suffer while at the race. *Id.* at 3.

17 Costello responds that Speedway failed to plead any affirmative defenses to her claims in
18 its answers to the third-party complaints, so Speedway is barred from asserting release and
19 waiver against her. She also argues that Speedway cannot rely on the release agreement because
20 Speedway is not a party to or third-party beneficiary of that contract. Finally, she argues that the
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23 ¹ Speedway does not move for judgment on the third-party claims asserted against it. Rather, it
“requests that Plaintiff’s Complaint be dismissed with prejudice.” ECF No. 71 at 6. I presume
Speedway is referring to Costello’s Third Amended Complaint (ECF No. 55).

1 release agreement does not bar her claim of gross negligence, and there are questions of fact that
2 prevent entry of summary judgment on that claim.

3 Speedway has not explained why it can assert these affirmative defenses now when it
4 failed to plead them. Speedway points out that Federal Rule of Civil Procedure 14(a)(2)(C)²
5 allows it to assert against Costello any defense that Glen Wood and Alexander have to Costello's
6 claims. But Rule 8(c)(1) requires Speedway to "affirmatively state any . . . affirmative defense,
7 including" release and waiver. While Speedway asserted waiver as an affirmative defense to the
8 third-party claims against it,³ it did not assert waiver or release as affirmative defenses to
9 Costello's claims.

10 The failure to set forth an affirmative defense in the answer waives that defense. *In re*
11 *Adbox, Inc.*, 488 F.3d 836, 841 (9th Cir. 2007). However, the Ninth Circuit has "liberalized the
12 requirement that defendants must raise affirmative defenses in their initial pleadings." *Magana v.*
13 *Commonwealth of the N. Mar. I.*, 107 F.3d 1436, 1446 (9th Cir. 1997). I may permit Speedway
14 to raise these affirmative defenses for the first time in a motion for summary judgment, but "only
15 if the delay does not prejudice" Costello. *Id.*

16 The Ninth Circuit cases allowing a defendant to raise an affirmative defense for the first
17 time in a motion for summary judgment do not evaluate whether the defendant should be
18 required to meet Federal Rule of Civil Procedure 16(b)'s "good cause" standard if a scheduling
19 order is in place. "Additionally, to the extent these cases stand for the proposition that prejudice
20 to the plaintiff is the only inquiry, these cases truncate the Rule 15(a) analysis, which, in addition
21 to prejudice to the opposing party, considers bad faith, undue delay, futility of amendment, and

22 ² Speedway incorrectly refers to Nevada Rule of Civil Procedure 14, which does not apply in this
23 federal proceeding. ECF No. 85 at 4.

³ See ECF No. 27 at 2, ECF No. 82 at 2.

1 whether the moving party previously has amended the pleading at issue.” *Hernandez v. Creative*
2 *Concepts, Inc.*, 295 F.R.D. 500, 504-05 (D. Nev. 2013).

3 I conclude that because Speedway seeks to assert new affirmative defenses in a motion
4 for summary judgment after the deadline to amend pleadings expired, it must meet both Rule
5 16(b)’s good cause standard for amending the scheduling order as well as Rule 15’s standard for
6 amending the pleadings. *See Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 715-18 (8th Cir.
7 2008) (holding that the district court erred by failing to apply Rule 16(b)’s good cause standard
8 in ruling on defendants’ motion to amend); *Sadid v. Vailas*, 943 F. Supp. 2d 1125, 1140 (D.
9 Idaho 2013) (holding that Rule 16(b)’s good cause standard applies to a defendant’s attempt to
10 assert a new affirmative defense after the scheduling order’s deadline to amend pleadings has
11 passed); *Hernandez*, 295 F.R.D. at 504-05 (same).

12 Rule 16(b)’s stringent “good cause” standard focuses on the moving party’s diligence.
13 *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000); *Johnson v. Mammoth*
14 *Recreations, Inc.*, 975 F.2d 604, 600 (9th Cir. 1992). That standard typically will not be met
15 where the moving party has been aware of the facts and theories supporting amendment since the
16 inception of the action. *See, e.g., United States v. Dang*, 488 F.3d 1135, 1142-43 (9th Cir. 2007).
17 If Speedway is able to satisfy Rule 16(b)’s good cause standard, then I examine whether the
18 amendment is proper under Rule 15(a). *Johnson*, 975 F.2d at 608.

19 Speedway has not addressed, let alone satisfied, any of these standards. It may be that
20 Costello is not prejudiced if I allow Speedway to assert the affirmative defenses of waiver and
21 release, especially if the parties have addressed them in discovery. But the record is unclear on
22 that, and I am not yet convinced that Speedway can demonstrate diligence and good cause to
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1 allow this late amendment. Because I am denying the motion for other reasons, I need not
2 decide this at this time.

3 Speedway did not reply to Costello’s argument that it has no standing to rely on the
4 release agreement. Speedway impliedly acknowledges that it is not a party to that contract. “To
5 assert standing as a third-party beneficiary to a contract, a plaintiff must show (1) a clear intent to
6 benefit the third party, and (2) the third party’s foreseeable reliance on the agreement.” *Boesiger*
7 *v. Desert Appraisals, LLC*, 444 P.3d 436, 441 (Nev. 2019) (citation omitted). Speedway offers
8 nothing to satisfy either of these prongs. It does not present evidence, or even explain, what role
9 it played on the day of the incident, so I cannot determine whether it is a “releasee” or intended
10 beneficiary under the release agreement. I therefore deny Speedway’s motion based on the
11 release.

12 Finally, Speedway argues that summary judgment is appropriate on Costello’s claim of
13 gross negligence “because it is beyond dispute that the incident did not involve gross negligence
14 but was the result of negligence caused by Ms. Costello and/or Mr. Alexander.” ECF No. 71 at 5.
15 Speedway offers no admissible evidence in support of this allegation in its motion and attaches
16 only a few pages of Costello’s deposition to its reply. Because the same issue is addressed in the
17 summary judgment briefing between Costello and the other defendants with more extensive
18 briefing on both the evidence and the law, I deny Speedway’s motion on this issue. As
19 Speedway notes, “[i]f the Plaintiff’s claims against the Defendants Wood Brothers and Travis
20 Alexander go away, so do[] the third party claims against Nevada Speedway LLC.” ECF No. 85
21 at 4. Consequently, all parties will benefit by resolution of the issue on more complete briefing.

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1 I THEREFORE ORDER that Nevada Speedway's motion for summary judgment (**ECF**
2 **No. 71)** is **DENIED**.

3 DATED this 30th day of September, 2021.

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5 ANDREW P. GORDON
6 UNITED STATES DISTRICT JUDGE
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